IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO.1636 OF 2006

Shri Ganesh @ Annu Shivram Shetty, Age 33 years, residing at Ashokwadi Chawl No.1, Room No.17, Adarsh Lane, Khar (East), Mumbai – 400 051 (At present in Nashik Road Central Prison, Nashik). ... Petitioner

Versus

1. Shri A.N. Roy, Commissioner of Police, Greater Bombay, Mumbai.
2. The State of Maharashtra (Through the Secretary, Home Department (Spl.), Mantralaya, Mumbai.)
3. The Superintendent, Nashik Road Central Prison, Nashik.
4. The Secretary, Advisory Board, Constituted under Section 9 of M.P.D.A. Act, c/o. Home Department (Special), Mantralaya, Mumbai – 400 032. ... Respondents

Mr. U.N. Tripathi for the petitioner.

Ms. S.D. Shinde, A.P.P., for the State.

CORAM : SMT. RANJANA DESAI, &
D.B. BHOSALE, JJ.

DATE ON WHICH THE JUDGMENT RESERVED : 19TH APRIL, 2007.

DATE ON WHICH THE JUDGMENT PRONOUNCED : 4TH MAY, 2007.

JUDGEMENT:- (Per Smt. Ranjana Desai, J.)

1. The petitioner has been detained under the Order of Detention dated 23/6/2006 issued by respondent 1 – the Commissioner of Police, Greater Bombay, under the provisions of the Maharashtra Prevention of Dangerous Activities of Slumlords, Bootleggers, Drug Offenders and Dangerous Persons Act, 1981 (for short, "the said Act") with a view to preventing him from acting in any manner prejudicial to the maintenance of public order. In this petition, the petitioner has challenged the said order of detention.

2. The order of detention is issued on the basis of one case registered at Nirmal Nagar Police Station vide C.R. No.71 of 2006 under sections 326, 506 (II), 34 of IPC on 25/3/2006 and two in-camera statements of witnesses "A" and "B".

3. The incident in connection with which C.R. No.71 of 2006 was registered, took place on 24/3/2006. In connection with this incident, the petitioner was arrested on 1/4/2006. On 7/4/2006, he was ordered to be released on bail. The petitioner availed of the bail facility on 7/4/2006.

4. Confidential inquiries were made into the criminal activities of the petitioner. Statements of witnesses "A" and "B" were recorded in-camera on the assurance that their names will not be disclosed. Statement of "A" was

recorded on 9/5/2006 in which he deposed about an incident which had taken place in the first week of March, 2006. According to witness "A", the petitioner was involved in this incident. Statement of witness "B" was recorded on 11/5/2006 in which he deposed about an incident, which had taken place in the 3rd week of March, 2006. According to witness "B", the petitioner was involved in this incident.

5. After considering the relevant documents, the sponsoring authority submitted the proposal to the detaining authority on 22/5/2006. After perusing the proposal and the documents submitted along with it, the detaining authority issued the impugned order of detention.

6. We have heard Mr. Tripathi, the learned counsel appearing for the petitioner and Ms. Shinde, the learned A.P.P. appearing for the State.

7. Mr. Tripathi attacked the impugned order only on one ground. Mr. Tripathi pointed out that the Secretary of the Advisory Board had sent intimation letter dated 10/7/2006 to the petitioner. The relevant sentences thereof on which Mr. Tripathi has laid stress read as follows : *"if you wish you can take the assistance of your friend who is not a legal practitioner or examine witness and keep him present at the time of interview*". According to the learned counsel, the use of the disjunctive word "or" in the said intimation

letter shows non-application of mind. Mr. Tripathi submitted that the word "or" has misled the petitioner. It created confusion in his mind. The petitioner was not sure whether he has to take assistance of a friend or produce and examine witnesses. According to Mr. Tripathi, therefore, the petitioner only produced his witnesses. He did not know that he could also take assistance of his friend. Mr. Tripathi submitted that the intimation letter is vague and misleading. He submitted that on account of this infirmity, the continued detention of the petitioner must be quashed and set aside. Mr. Tripathi submitted that while issuing orders of preventive detention, authorities must bear in mind that strict compliance of procedure is expected from them and whether prejudice is caused to the detenu or not is not relevant. In support of his submissions, Mr. Tripathi relied on the judgments of the Supreme Court in ***Jagannath Misra v. State of Orissa, 1966 Cri.L.J. 817, A.K. Roy v. Union of India & Anr., 1982 Cri.L.J. 340, Abdul Zabbar v. State of Rajasthan & Ors., (1984) 1 SCC 443, Mrs. Tsering Dolkar v. The Administrator, Union Territory of Delhi & Ors., AIR 1987 SC 1192, Johney D' Cout v. State of Tamil Nadu, AIR 1988 SC 109, State of Andhra Pradesh & Anr. v. Balajangam Subbarajamma (1989) 1 SCC 193, Anil Vats v. Union of India & Ors., 1991 Cri.L.J. 605, Abhay Shridhar Ambulkar v. S.V. Bhave, Commissioner of Police & Ors., 1991 SCC (Cri.) 222*** and the judgments of this court in ***Salma Rehman Khan v. M.N. Singh & Ors., 2001 ALL MR (Cri.) 2063*** and ***Haripal Hiralal Lahot v. D. Sivanandhan, Commissioner***

of Police, Thane & Ors., 2006 ALL MR (Cri.) 2815.

8. Ms. Shinde, the learned A.P.P. appearing for the State on the other hand submitted that the disjunctive word used in the intimation letter sent by the Advisory Board has not caused any prejudice to the petitioner. She submitted that the petitioner had submitted a representation through his lawyer to the Advisory Board. In this representation, the petitioner made no grievance that the use of the word "or" has caused any prejudice to him. He did not make a grievance that on account of the use of the word "or", he was confused or misled. Ms. Shinde submitted that in fact the petitioner examined his mother and his brother. The Advisory Board heard the petitioner, his mother and brother and considered the written representation of the petitioner. Therefore, it cannot be said that any prejudice was caused to the petitioner. The learned A.P.P. submitted that even while considering the validity of preventive detention orders, the court can consider whether on account of any alleged infirmity, prejudice is caused to the detenu. Prejudice is a relevant consideration in preventive detention cases. Ms. Shinde submitted that since no prejudice is caused to the petitioner on account of the use of the word "or", the order of detention may not be set aside on the ground that the intimation letter of the Advisory Board contains the word "or" instead of "and". In support of her submissions, Ms. Shinde relied on the judgments of the Supreme Court in ***Kumarunnissa v. Union of India & Anr.,***

1991 Cri.L.J. 2058 and ***Veeramani v. State of Tamil Nadu, 1995 Cri.L.J. 2644***. She also relied on the judgment of this court in ***Kirti Kumar Narulla v. State of Maharashtra & Ors., 2004 All MR (Cri.) 2094***.

9. To understand the submission of Mr. Tripathi, it is necessary to have a look at section 11 of the said Act. Section 11 so far as it is relevant reads as under :

> *"11(1)x x x x x x x x x x x x x x x*
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> *(2) x x x x x x x x x x x x x x x*
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> *(3) x x x x x x x x x x x x x x x*
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> *(4) x x x x x x x x x x x x x x x*
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> *(5) Nothing in this section shall entitle any person agaisnt whom a detention order has been made to appear by any legal practitioner in any matter connected with the reference to the Advisory Board."*

Similar provision is also there in the National Security Act, 1980 and in the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974.

10. In ***A.K. Roy' scase (supra)***, the Supreme Court was considering the rights of a detenu detained under the National Security Act, 1980 in the

proceedings before the Advisory Board. The Supreme Court referred to Article 21 and Article 22 of the Constitution of India and observed that the procedure prescribed by law for the proceedings before the Advisory Board must be fair, just and reasonable. The Supreme Court held that the detenu has no right to appear through a legal practitioner in the proceedings before the Advisory Board. However, if the detaining authority or the Government takes the aid of a legal practitioner or a legal adviser before the Advisory Board, the detenu must be allowed the facility of appearing before the Board through a legal practitioner. The Supreme Court further observed that very often the officers of the Government in the concerned departments appear before the Board and assist it with a view to justifying the detention orders. The Supreme Court observed that such practice must be avoided. The Supreme Court further observed that the embargo on the appearance of legal practitioners should not be extended so as to prevent the detenu from being aided or assisted by a friend who, in truth and substance, is not a legal practitioner. It was further observed that every person whose interests are adversely affected as a result of the proceedings which have a serious import, is entitled to be heard in those proceedings and be assisted by a friend. The Supreme Court also observed that the detenu would be entitled to offer oral and documentary evidence before the Advisory Board in order to rebut the allegations made against him. Therefore, the detenu' sright to be aided or assisted by a friend before the Advisory Board is recognised by the Supreme

Court.

11. In ***Abdul Zabbar' scase (supra)***, the challenge before the Supreme Court was that the proceedings before the Advisory Board were vitiated by denial of a right to the detenu to be represented by a friend. The detenu had made an application to the Advisory Board for being represented either through a counsel or by a non-lawyer educated friend. That request was turned down and after hearing the detenu in person, the Advisory Board gave its order justifying the detention order. The Supreme Court quoted its observations made in ***A.K. Roy' scase (supra)*** that the statute does not exclude the right of the detenu to take the aid of a friend and whenever demanded, the Advisory Board must grant that facility. Inasmuch as the detenu was denied this opportunity, the Supreme Court set aside the continued detention of the detenu.

12. In ***Anil Vats' scase (supra)***, the detenu was denied assistance of a friend in proceedings before the Advisory Board on the ground that he was a graduate and competent to defend himself. The Supreme Court observed that the position of the detenu in custody will have to be appreciated. A detenu being in custody may not properly be served by his memory, he may be nervous, incoherent and his faculties may be benumbed. The Supreme Court further observed that the assistance of a friend would result in fairness

of procedure towards the detenu. The Supreme Court made it clear that a timely request of the detenu for being allowed to be assisted by a friend ought to be considered. The Supreme Court rejected the contention that since the detenu was a graduate, the judgment in ***A.K. Roy' scase (supra)*** was not applicable to his case. The Supreme Court allowed the petition on the ground that procedural safeguard as envisaged under Article 22(5) was not satisfied.

13. Once it is held that the petitioner has a right to be aided or assisted before the Advisory Board by a friend, it is necessary to examine whether that right has been violated in this case because of the use of disjunctive "or" in the letter of intimation sent by the Advisory Board to him. In ***Jagannath Misra' scase (supra)***, the Supreme Court was dealing with the order of detention issued under the provisions of the Defence of India Act, 1962. Section 3 thereof empowers the Central Government to make such rules as appear to be necessary or expedient for securing the defence of India and civil defence, the public safety, etc. Sub-section (2) thereof clearly empowered any authority to make orders providing for all or any of the matters detailed in sub clauses thereof. The order of detention was issued on some of the grounds mentioned in section 3(2)(15). Clause 15 separated the grounds by the use of the disjunctive "or". The Supreme Court observed that the disjunctive "or" used in the order of detention indicated that the order is

more or less a copy of section 3(2)(15). The Supreme Court found that this unmistakably indicated casualness in the making of the order. The Supreme Court observed that where number of grounds are the basis of the detention order, the various grounds are expected to be joined by conjunctive “and” and the use of disjunctive “or” in such case makes no sense. The Supreme Court further observed that the use of disjunctive “or” showed that the order was more or less a copy of sections 3(2)(15) without any application of mind of the concerned authority to the grounds of detention.

14. In ***Abhay Ambulkar' case (supra)***, the Supreme Court was dealing with a detention order issued under the National Security Act. Under sub-section (2) of section 3 of that Act, the Central Government or the State Government may, if satisfied with respect to any person that with a view to preventing him from acting in any manner prejudicial to the security of the State or from acting in any manner prejudicial to the maintenance of public order or from acting in any manner prejudicial to the maintenance of supplies and services essential to the community it is necessary so to do, make an order directing that such person be detained. Under sub-section (3) of section 3 thereof, if having regard to the circumstances prevailing or likely to prevail in any area within the local limits of the jurisdiction of a District Magistrate or a Commissioner of Police, the State Government is satisfied that it is necessary so to do, it may, by order in writing, direct, that during such

period as may be specified in the order, such District Magistrate or Commissioner of Police may also, if satisfied as provided in sub-section (2) exercise the powers conferred by the said sub-section.

15. In the order delegating power to the Commissioner of Police passed under sub-section (3) of section 3 of the National Security Act, the State Government had stated that the Government was satisfied that having regard to the circumstances prevailing or likely to prevail in Greater Bombay Police Commissionerate it is necessary that during the period commencing on 30/1/1990 to 29/4/1990, the Commissioner should also exercise the powers conferred under sub-section (2) of section 3 of the National Security Act. The Supreme Court observed that this was indeed no more than a reproduction of the terms of sub-section (3) of section 3. The Supreme Court observed that sub-section (3) of section 3 refers to two independent circumstances viz. the prevailing circumstances and the circumstances that are likely to prevail. The Supreme Court observed that if the Government wants that the District Magistrate or the Commissioner of Police should also exercise the powers for the current period, it has to satisfy itself with the prevailing circumstances. If the Government wants that the District Magistrate or the Commissioner of Police should also exercise the powers during the future period, it must be satisfied with the circumstances that are likely to prevail during that period. The Supreme Court observed that subjective satisfaction for the exercise of

powers under sub-section (3) of section 3 must be based on circumstances prevailing at the date of the order or likely to prevail at a future date. The period during which the District Magistrate or the Commissioner of Police, as the case may be, is to exercise the power provided by sub-section (2) of section 3 is to be specified in the order which would depend on the existence of circumstances in praesenti or at a future date. The Supreme Court further observed that if the conferment of power is considered necessary because of circumstances likely to prevail during the future period, the duration for the exercise of power must be relatable to the apprehended circumstances. The Supreme Court further observed that therefore, the specification of the period during which the District Magistrate or Commissioner of Police is to exercise power under sub-section (2) of section 3 would depend on the subjective satisfaction as to the existence of the circumstances in praesenti or futuro. The Supreme Court sounded a note of caution that since very drastic powers of detention without trial are to be conferred on subordinate officers, the State Government is expected to apply its mind and make a careful choice regarding the period during which such power shall be exercised by the subordinate officials, which would solely depend on the circumstances prevailing or likely to prevail. The Supreme Court observed that the use of the word “or” signifies either of the two situations for different periods. The Supreme Court clarified that that does not mean that the power cannot be exercised for a future period by taking into consideration circumstances

prevailing on the date of the order as well as circumstances likely to prevail in future. But, in that case, the two circumstances would have to be joined by conjunctive word “and” not the disjunctive word “or”. The Supreme Court added that the use of the disjunctive word “or” in the impugned Government Order only indicated non-application of mind and obscurity in thought. The Supreme Court further observed that the obscurity in thought inexorably leads to obscurity in language. The Supreme Court quashed the Government Order dated 6/1/1990 delegating the power to the District Magistrate or the Commissioner of Police by observing that apparently, the Government seems to be uncertain as to the relevant circumstances to be taken into consideration, and that appears to be the reason why they have used the disjunctive word “or” in the impugned order.

16. Ms. Shinde, the learned A.P.P. tried to distinguish the above cases by arguing that in those cases the defect was either in the delegation order or in the order of detention whereas in this case the alleged defect is in the letter of intimation sent by the Advisory Board to the petitioner. She submitted that that letter will not vitiate the detention order.

17. We are unable to accept Ms. Shinde's submission fully. The defect in the letter will not vitiate the detention order but it will render the continued detention invalid. It is repeatedly stated by the Supreme Court that in preventive detention cases there has to be strict compliance with the

procedural requirements because they are the only safeguards available to a detenu. We have already reproduced the observations of the Supreme Court in ***A.K. Roy's case (supra)*** that the procedure prescribed by law for the proceedings before the Advisory Board must be fair, just and reasonable. In ***Balajangam's case (supra)***, the Supreme Court has observed that the procedure adopted by the Advisory Board must satisfy the procedural fairness. Proceedings before the Advisory Board are not an empty formality. Under section 12(2) of the said Act, if the Advisory Board reports that there is, in its opinion, no sufficient cause for the detention of the person concerned, the State Government has to revoke the detention order and release the detenu. Under section 11(1) thereof, the Advisory Board can hear the detenu in person if it feels that it is necessary to do so or if the person concerned desires to be heard. As stated by the Supreme Court in ***A.K. Roy's case (supra)***, the detenu has a right to be aided or assisted by a friend before the Advisory Board. Assistance of a friend can be very vital to the detenu's case for if his friend is able to convince the Advisory Board that there is no sufficient cause for his detention, the Advisory Board can send report to the State Government accordingly and the State Government has then no option but to release the detenu. Therefore, the intimation letter sent by the Advisory Board to the detenu, conveying his rights must be clear and unambiguous. Just as a detention order must be clearly worded, the intimation letter must also be clearly worded for if it is not so worded and the detenu is confused,

the proceedings before the Advisory Board may be vitiated. In our opinion, the petitioner can draw support from the law laid down by the Supreme Court in ***Jagannath Misra' scase (supra)*** and in ***Abhay Amulkar' scase (supra)***.

18. It is now necessary to deal with the submission of Ms. Shinde, the learned A.P.P. that assuming there is infirmity in the intimation letter, it is open to this court to examine whether any prejudice is caused to the petitioner and if this court comes to the conclusion that no prejudice is caused to him, the infirmity shall not vitiate the petitioner' sdetention. In short, the question is whether prejudice is a relevant consideration while considering the validity of detention order. Mr. Tripathi, the learned counsel for the petitioner, on the other hand, urged that whether any prejudice is caused to the petitioner or not, is immaterial. It is necessary to refer to the judgments on which reliance is placed by the learned counsel in this connection.

19. In ***Kumarunnisa' scase (supra)***, the detenu was detained under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974. The detenu' sgrievance was that since search authorisations were not supplied to him, there was a violation of his right to make a representation. The Supreme Court held that it is not sufficient to say that the detenu was not supplied copies of the documents in time on demand, but what is essential is that the detenu must show that the failure to supply the documents had caused prejudice to him. Since the detenu was not successful in establishing

prejudice, the Supreme Court rejected his submission that his right to make a representation was violated.

20. In ***Veeramani' s case (supra)***, the detenu challenged the detention order on the ground that the detaining authority had relied on some documents which were not supplied to him. The Supreme Court held that the said documents did not form the basis of the grounds of detention but even otherwise non-supply of those documents had not caused any prejudice to the detenu and as a matter of fact while making the representation, the detenu did not ask for any such documents.

21. In ***Mrs. Tsering' s case (supra)***, the detenu was not served with documents in a language known to him. English documents were served on him. Justification for this lapse was that the detenu's wife know English. The Supreme Court observed that in the matter of preventive detention the test is not one of prejudice but one of strict compliance with the provisions of the Act under which the detenu is detained and where there is a failure to comply with those requirements, it becomes difficult to sustain the order.

22. In ***Johney D' Couto' s case (supra)***, the Advisory Board had refused assistance of a friend to the detenu. The Supreme Court held the refusal of

such assistance to the detenu was not justified. The Supreme Court made it clear that it is not for this court to examine and assess what prejudice has been caused to the detenu on account of such denial. The Supreme Court observed that it had reiterated the position that matters relating to preventive detention are strict proceedings and warrant full compliance with the requirements of law.

23. In ***Anil Vats' scase (supra)***, to which we have already made a reference, assistance of a friend was refused by the Advisory Board on the ground that the detenu was a graduate. The Supreme Court referred to its judgment in ***Johney D' Couto'cas se (supra)*** and held that refusal of assistance of a friend to the detenu by the Advisory Board on the ground that the detenu was a graduate was unjustified. The Supreme Court went on to say that assistance of a friend would result in fairness of procedure towards the detenu. The Supreme Court set aside the continued detention on the ground that the procedural safeguard as envisaged under Article 22(5) of the Constitution of India was not satisfied.

24. The above judgments make it clear that the doctrine of prejudice is not unknown to the law of preventive detention. Where grievance of non-supply of documents is made, it comes into operation if it is evident that detention order is sought to be frustrated by raising a frivolous plea of non supply of

documents when those documents are either not relevant or are documents which do not form the basis of the detention order. As to in which cases prejudice would be a relevant consideration would depend on facts and circumstances of each case. It is also clear that the Advisory Board has to follow a fair procedure. It has to strictly comply with the procedural safeguards and if there is any breach of procedural safeguards affecting the detenu's right under Article 22(5) of the Constitution of India, whether prejudice is caused to the detenu or not may not be a relevant consideration unless the court comes to a conclusion that the contention is raised just to frustrate the detention order.

25. We will apply the above principles to the present case. Mr. Sonde, the Secretary of the Advisory Board who was present at the time when the petitioner' scase was heard by the Advisory Board has stated in his affidavit that meeting of the Advisory Board was held on 21/7/2006. The petitioner was produced before the Advisory Board. The petitioner submitted a written representation to the Advisory Board. The Advisory Board considered it. The Advisory Board heard the petitioner, his mother and a relative who was a friend and, thereafter, on 8/8/2006, the Advisory Board forwarded its report to the Government. We have perused the record of the Advisory Board. The record bears out Mr. Sonde' sabove assertion, but Mr. Sonde is not right in describing the complainant who was produced by the petitioner before the

Advisory Board as the petitioner's friend. The petitioner has clearly stated in the petition that the intimation letter of the Advisory Board is vague and misleading and, therefore, he could only produce the complainant but could not take the assistance of his friend. The hearing given to the petitioner's mother and a witness cannot be equated with hearing given to a friend. Assistance of a friend would obviously mean fruitful assistance of a person who can put across the petitioner's case. In the circumstances, it is reasonable to hold that on account of the use of the disjunctive "or" in the letter of intimation of the Advisory Board, the petitioner could only produce his witness but he could not take the assistance of a friend. We are of the opinion that in the facts of this case, there is a violation of the procedural safeguard as envisaged under Article 22(5) of the Constitution of India.

26. It is true that in the representation submitted on behalf of the petitioner, which was drafted by a lawyer, this point was not raised. But on that ground, it cannot be said that it is an afterthought. The fact remains that though the petitioner kept his witnesses present and they were heard, he could not take the assistance of his friend and this is because the petitioner was not clearly told that he could take the assistance of his friend and examine witnesses. Advisory Board has committed breach of procedural safeguard. In the circumstances, the continued detention of the petitioner must be set aside. Hence, the following order.

O R D E R

Continued detention of Ganesh @ Annu Shivram Shetty under the impugned order of detention dated 23/6/2006 is set aside. Petitioner - Ganesh @ Annu Shivram Shetty be released forthwith unless otherwise required in any other case. The petition is disposed of.

(SMT. RANJANA DESAI, J.)

(D. B. BHOSALE, J.)